

corrected

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<b>Filed</b>  JUL 10 2013  CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	σ COURT USE ONLY σ
<b>JAMES HOLMES,</b> Defendant	Case No. <b>12CR1522</b>
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Division 26
<b>OBJECTION TO COURT'S RULING ON MR. HOLMES' MOTION FOR A FAIR TRIAL UNENCUMBERED BY AN UNNECESSARY DISPLAY OF COURTROOM SECURITY AND RENEWED REQUEST FOR A HEARING [D-76a]</b>	

### CERTIFICATE OF CONFERRAL

Conferral is not appropriate for this pleading.

Pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 18, 20 and 25 of the Colorado Constitution, Mr. Holmes, through counsel, hereby objects to the Court's Order Regarding Defendant's Motion for a Fair Trial Unencumbered by an Unnecessary Display of Courtroom Security. In particular, the defense objects to the Court's decision that public safety requires Mr. Holmes to be hitched to the floor like an animal during the trial, the Court's apparent *ex parte* communications with the Sheriff, and to the Court's decision to release this order publicly and prior to the submission of all written pleadings on this issue. Mr. Holmes requests that this Court reconsider its ruling, and renews his request for a hearing on this motion. As grounds, Mr. Holmes states the following:

1. In its order, the Court concludes that "public safety" requires Mr. Holmes to "wear a harness under his clothing" that "will have a cable which will be anchored to the floor." There are several aspects in which this order is incorrect, troubling, and inhumane.

2. First, the Court concludes that the "multiple violent charges in this case" justify its decision to chain Mr. Holmes to the floor during the trial. However, other than the nature of the charges in this case, it has made no particularized finding that restraining Mr. Holmes in this undignified and unprecedented fashion is justified.

3. Colorado courts have repeatedly held that a defendant's request to appear without restraints may be denied "only when necessary for physical security, prevention of escape, or courtroom decorum." *People v. Knight*, 167 P.3d 147, 153 (Colo. App. 2006); *People v. Melanson*, 937 P.2d 826, 835-36 (Colo. App. 1996) (while public safety "may" require physical restraints to be imposed where defendant has been accused of violent crime, court "should pursue the least restrictive means available"); *Lucero v. Lundquist*, 196 Colo. 95, 97, 580 P.2d 1245, 1246 (1978) ("Only that security is permitted which is necessary to insure that the defendant remains in custody, and will not endanger court personnel or others in the courtroom, and will not disrupt the trial." (emphasis added)).

4. Courts in other jurisdictions have also held that due process requires a trial court to find the presence of a special need before authorizing the use of both visible and non-visible restraints. See, e.g., *People v. Allen*, 856 N.E.2d 349, 352 (Ill. 2006) (requiring showing of manifest need for restraint before use of electronic stun belt is warranted); *People v. Mar*, 52 P.3d 95, 106 (Cal. 2002) (same); *United States v. Baker*, 432 F.3d 1189, 1244 (11th Cir. 2005) (Supreme Court's holding in *Deck v. Missouri*, 544 U.S. 622 (2005), requires "a case specific and individualized assessment of each defendant" before use of leg irons concealed from the jury were justified); *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) (nonvisible restraints "pose many of the same constitutional concerns" as do visible physical restraints, and must be subject to "at least the same close judicial scrutiny"); *United States v. Miller*, 531 F.3d 240, 246 (6th Cir. 2008) (district court abused its discretion by requiring defendant to wear stun belt absent showing of necessity); *United States v. Honken*, 541 F.3d 1146, 1164 (8th Cir. 2008) (approving of district court's conclusion that it must make specific findings of necessity before use of stun belt is justified); *Gonzalez v. Pliler*, 341 F.3d 897, 901 (9th Cir. 2003) (decision to use stun belt must be subjected to same close judicial scrutiny required for imposition of other physical restraints; remand required for evidentiary hearing on issue of prejudice).

5. Other than the nature of the charges in this case, there is no evidence that Mr. Holmes presents a danger to the safety of the courtroom or a flight risk of any kind. To the contrary, the evidence revealed thus far in the case supports the defense's position that Mr. Holmes suffers from a severe mental illness and was in the throes of a psychotic episode when he committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012. Mr. Holmes has never once presented as anything other than compliant and well-behaved during the numerous court appearances that have taken place over the past year. Unlike the defendant in *Melanson*, 937 P.2d at 835, cited by the Court, Mr. Holmes has no previous history of violent crime – and indeed, no criminal history whatsoever – and prior to the events of July 20, had never been incarcerated before for any reason, much less for a violent felony as in *Melanson*.

6. Therefore, Mr. Holmes objects to the Court's cursory conclusion that restraints are necessary simply because of the "multiple violent charges in this case." At a minimum, the Court should have granted an evidentiary hearing on this issue as the court in *Melanson* did, to allow the parties to litigate the issue and to ensure that the imposition of physical restraints at trial on Mr. Holmes is justified, and to further determine what type of physical restraints were the "least restrictive means available." *Melanson*, 937 P.2d at 835.

7. Instead, without consulting the parties, this Court apparently conferred extensively with the Sheriff *ex parte* and concluded that leashing a mentally ill man to the floor in a manner that is, to counsel's knowledge, unprecedented in this jurisdiction, was not only necessary but appropriate. The Court's and the Sheriff's agreed-upon method of restraining Mr. Holmes violates a judge's obligation to "seek to maintain a judicial process that is a dignified process" and undermines "[t]he courtroom's formal dignity, which includes the respectful treatment of defendants . . . ." *Deck v. Missouri*, 544 U.S. 622, 631 (2005).

8. Even in the most serious and tragic of cases, the Eighth Amendment requires the courtroom proceedings to be conducted in a way that conveys a "fundamental respect for humanity." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court's decision to put Mr. Holmes on a leash and chain him to the floor is inconsistent with this constitutional mandate and is reminiscent of forms of dehumanizing and humiliating punishment that have been found to "offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Hope v. Pelzer*, 536 U.S. 730, 732 (2002) (use of hitching post in Alabama prison violates Eighth Amendment).

9. This proposed method of restraint also constitutes impermissible punishment before trial and "shocks the conscience" in violation of Mr. Holmes' substantive due process rights. *People v. Garlotte*, 958 P.2d 469, 474 (Colo. App. 1997); *Rochin v. California*, 342 U.S. 165, 173 (1952) ("States in their prosecutions [must] respect certain decencies of civilized conduct").

10. Moreover, depending on the specific facts and circumstances surrounding this practice which should be more fully and appropriately explored in an evidentiary hearing, anchoring Mr. Holmes to the floor in the manner ordered by the Court implicates numerous of his other constitutional rights, including the right to a fair trial, right to confront witnesses, right to testify, right to confer with counsel and participate in his defense, and the right to be presumed innocent pursuant to the Fifth, Sixth, and Fourteenth Amendments and article II, sections 18 and 25 of the Colorado Constitution.

11. Mr. Holmes also objects to the Court's decision not to suppress this order, as is within its discretion. As a result of this decision, the fact that Mr. Holmes will be chained to the floor during trial has been widely broadcast and publicized throughout the state of Colorado and beyond. See Exhibits A & B, attached. The Court's actions in this regard have thus undermined Mr. Holmes' right to a fair trial by an impartial jury. The fact that the leash will be purportedly concealed is of no benefit once the Court broadcasts it to the prospective jury pool.

12. Moreover, as explained in [D-076], in Colorado, "not a continuing threat to society" is a statutory mitigator, the existence and weight of which may determine whether an accused is eligible for the death penalty and, if so, whether it or a life penalty should be imposed. See § 18-1.3-1201 (4)(k), C.R.S. Another statutory mitigator is "[t]he extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting attorney." § 18-1.3-1201(4)(h), C.R.S. If this case reaches a sentencing phase, counsel will argue that Mr. Holmes is cooperative and is not a continuing threat to society.

13. While the Court has assured that the anchor will not be noticed by jurors, it has conceded that the "cable may be visible" to the jury. Moreover, as explained above, the prospective jury pool in this case is now aware of the restraints as a result of the Court's decision to release its order to the public. Anchoring Mr. Holmes to the floor in the manner the Court has proposed interferes with his constitutional right to ask jurors to give fair consideration to statutory mitigating factors and will convey to jurors the impression that Mr. Holmes is so dangerous that he must be chained up for their safety.

14. Indeed, after the Court released its order, CNN reported, "The point is, they're worried that he could hurt somebody, so they want to prevent him from doing that to anyone in the courtroom. We have looked at other examples of defendants restrained in this way. It is incredibly rare. The closest was a man accused of murder in 2009. He was restrained with handcuffs and a harness, but that was after he acted out by slapping his attorney in the forehead. So this is before anything has even happened, they've already made this decision." See <http://www.youtube.com/watch?v=z--QfyCRrYw>.

15. As the United States Supreme Court noted in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-55 (1976):

The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. *The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts.* More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process.

16. Mr. Holmes also objects to the Court's conclusion, based on *ex parte* communications with the Sheriff and without a hearing, that "the presence of law enforcement at the courthouse, including armed security on the roofs of the buildings and uniformed law enforcement personnel in the parking lots and grounds surrounding the courthouse," is "absolutely necessary." The Court should have afforded Mr. Holmes an opportunity for a hearing on this issue during which the necessity of these measures could have been litigated. Denying Mr. Holmes a hearing on this issue and concluding that these measures are absolutely necessary imperils Mr. Holmes's right to a fair trial by an impartial jury, particularly given the fact that the Court's order and its conclusions on this issue have now been widely publicized by the media.

17. Finally, the defense objects to the Court's ruling on this motion before all written pleadings on this issue were submitted, and without a hearing, in its haste to resolve the issues in this case and push this case forward to trial. In doing so, the Court violated its own case management order of April 16, 2013, [C-32], which requires that "[a]ll motions must be responded to in writing. Even if a motion is confessed, a written response must be submitted."

18. This practice also violates the portion of the case management order that requires that the opposing party "must respond to the request [for a hearing] in writing and must indicate whether there is an objection to the request and to the type of hearing requested. If a party fails to respond to a request for a hearing, the Court will construe such failure to mean that there is no objection to the request or to the type of hearing requested."

19. The purpose of motions practice is to allow the Court, as a neutral third party, an opportunity to hear both parties' positions on the issues before it rules on those issues. *See, e.g., Air Communication and Satellite Inc. v. EchoStar Satellite Corp.*, 38 P.3d 1246, 1253 (Colo. 2002) (court's role is to be neutral decisionmaker, while parties function in adversary capacity); *People v. Romero*, 694 P.2d 1256, 1266 (Colo. 1985) (court's role is to be "impartial arbiter").

20. Mr. Holmes respectfully asks this Court to reconsider its ruling and allow Mr. Holmes an opportunity to be heard on this issue, which implicates many of his important fundamental constitutional rights.

### **Request for a Hearing**

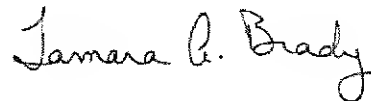
Mr. Holmes moves for an evidentiary hearing on this issue.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



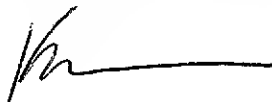
---

Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



---

Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)  
Deputy State Public Defender

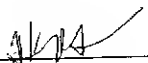
Dated: July 9, 2013

I hereby certify that on July 10, 2013, I

☐ mailed, via the United States Mail,  
☐ faxed, or  
☒ hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler  
Jacob Edson  
Rich Orman  
Karen Pearson  
Office of the District Attorney  
6450 S. Revere Parkway  
Centennial, Colorado 80111  
Fax: 720-874-8501



**D-076a**

**Exh. A**



# Holmes to wear hidden harness anchored to floor

**A** [aurorasentinel.com/news/holmes-to-wear-hidden-harness-anchored-to-floor/](http://aurorasentinel.com/news/holmes-to-wear-hidden-harness-anchored-to-floor/)

**DENVER** | Colorado theater shooting suspect James Holmes will be restrained during his trial by wearing a harness under his clothes that will be anchored to the floor, the judge said Thursday.

Judge Carlos A. Samour Jr. also ruled the jury will not be sequestered during the trial, which is scheduled to start in February and is expected to take four months.

Holmes is accused of killing 12 people and injuring 70 others at a movie theater in the Denver suburb of Aurora in July.

He has worn heavy shackles on his wrists and ankles during pretrial hearings. His lawyers wanted him to be unshackled during the trial, saying the restraints would make him look guilty to the jury.

Samour said Holmes has to be restrained because he is charged with violent crimes. He said jurors won't see the harness, and the anchoring cable will blend in with computer cables at the defense table.

The judge ruled earlier that Holmes can wear civilian clothing at his trial.

Holmes pleaded not guilty by reason of insanity to multiple charges of murder and attempted murder. Prosecutors are seeking the death penalty.

Defense lawyers wanted the jury sequestered and wanted the jurors barred from having phones, laptop computers or any other electronics devices during the trial.



File-This June 4, 2013 file photo shows Aurora theater shooting suspect James Holmes in court in Centennial, Colo. Holmes is scheduled Tuesday, June 25, 2013 at a hearing where the judge overseeing the Colorado theater shooting case will reconsider the timing of the trial and other proceedings. (AP Photo/The Denver Post, Andy Cross, Pool File)

The judge said sequestration for such a long time would be costly and impractical, and would create an undue burden on jurors. He implied it also could prompt some prospective jurors to try to avoid the case.

However, Samour said he would allow defense lawyers to renew the request later if they think they have grounds to do so.

Denying jurors access to smartphones, computers, television sets and radios — along with email and the Internet — would be drastic and unfair, the judge said.

But he did rule jurors will not be allowed to have the devices in court or during deliberations.

Samour said he might seat as many as 12 alternate jurors — an unusually large number — in the event any of the 12 regular jurors is dismissed for hearing outside information or other reasons.

"The court cannot keep the jurors in a bubble, completely sealed off from the outside world," the judge said.

Samour has said 5,000 potential jurors will get a summons and that he expects 3,200 to 3,500 to respond.

Holmes' lawyers had also asked the judge to scale back the heavy security that has been present during 11 months of pretrial hearings, saying it would be "extraordinary and unnecessary" during the trial and would prejudice the jury against Holmes.

They also objected to deputies standing so close to Holmes in the courtroom that they could hear his conversations with his attorneys.

Eight Arapahoe County sheriff's deputies usually stand guard in the courtroom during hearings. Others watch from the rooftops of the two courthouse buildings and in the parking lot.

Samour said four of the deputies in the courtroom will wear uniforms during the trial, and any others will wear street clothes. He also said they will keep a reasonable distance from the defense table.

The judge overruled the defense objection to having deputies on the rooftops and in the parking lot, saying they're necessary to protect Holmes and the public.

Samour said Sheriff Grayson Robinson had agreed to the hidden harness and tether for Holmes and the plainclothes deputies in the courtroom. Samour added he trusts Robinson's expertise and will heed his advice.

---

Follow Dan Elliott at <http://twitter.com/DanElliottAP>




**D-076a**

**Exh. B**

# Holmes to wear hidden harness anchored to floor

9news.com/news/article/342574/222/Holmes-to-wear-hidden-harness-anchored-to-floor-



- 
- 
- 
- 
- 
- 
- 
- - A A A +

DENVER - Aurora theater shooting suspect James Holmes will be restrained during his trial by wearing a harness under his clothes that will be anchored to the floor, the judge said Thursday.

Judge Carlos A. Samour Jr. also ruled the jury will not be sequestered during the trial, which is scheduled to start in February and is expected to take four months.

Holmes is accused of killing 12 people and injuring 70 others at a movie theater in Aurora in July.

He has worn heavy shackles on his wrists and ankles during pretrial hearings. His lawyers wanted him to be unshackled during the trial, saying the restraints would make him look guilty to the jury.

Samour said Holmes has to be restrained because he is charged with violent crimes. He said jurors won't see the harness, and the anchoring cable will blend in with computer cables at the defense table.

The judge ruled earlier that Holmes can wear civilian clothing at his trial.

Holmes pleaded not guilty by reason of insanity to multiple charges of murder and attempted murder. Prosecutors are seeking the death penalty.

Defense lawyers wanted the jury sequestered and wanted the jurors barred from having phones, laptop computers or any other electronics devices during the trial.

The judge said sequestration for such a long time would be costly and impractical, and would create an undue burden on jurors. He implied it also could prompt some prospective jurors to try to avoid the case.

However, Samour said he would allow defense lawyers to renew the request later if they think they have grounds to do so.

Denying jurors access to smartphones, computers, television sets and radios - along with email and the Internet - would be drastic and unfair, the judge said.

But he did rule jurors will not be allowed to have the devices in court or during deliberations.

Samour said he might seat as many as 12 alternate jurors - an unusually large number - in the event any of the 12 regular jurors is dismissed for hearing outside information or other reasons.

"The court cannot keep the jurors in a bubble, completely sealed off from the outside world," the judge said.

Samour has said 5,000 potential jurors will get a summons and that he expects 3,200 to 3,500 to respond.

Holmes' lawyers had also asked the judge to scale back the heavy security that has been present during 11 months of pretrial hearings, saying it would be "extraordinary and unnecessary" during the trial and would prejudice the jury against Holmes.

They also objected to deputies standing so close to Holmes in the courtroom that they could hear his conversations with his attorneys.

Eight Arapahoe County sheriff's deputies usually stand guard in the courtroom during hearings. Others watch from the rooftops of the two courthouse buildings and in the parking lot.

Samour said four of the deputies in the courtroom will wear uniforms during the trial, and any others will wear street clothes. He also said they will keep a reasonable distance from the defense table.

The judge overruled the defense objection to having deputies on the rooftops and in the parking lot, saying they're necessary to protect Holmes and the public.

Samour said Sheriff Grayson Robinson had agreed to the hidden harness and tether for Holmes and the plainclothes deputies in the courtroom. Samour added he trusts Robinson's expertise and will heed his advice.

(Copyright 2013 by The Associated Press. All Rights Reserved.)